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7
8 **BEFORE THE ARIZONA**

9 **STATE BOARD OF EDUCATION**

10 In the Matter of:

11 ROOSEVELT ELEMENTARY SCHOOL
DISTRICT NO. 66.

Case No. 2008-001

12 **ROOSEVELT ELEMENTARY**
13 **SCHOOL DISTRICT'S MOTION**
14 **TO DISMISS AND PREHEARING**
15 **BRIEF**

16 **I. BACKGROUND**

17 Roosevelt Elementary School District presents some of the toughest academic
18 challenges ever known in this state. The school district has demographics where 9 out
19 of 10 students come from poor homes that qualify for free or reduced lunch, a much
20 higher than normal incidence rate, even for Arizona, of students who are not fluent in
21 English, a substantial student turn-over rate, and a higher than average incidence of
22 special education students. Despite these challenges, Roosevelt Elementary School
23 District has recently made substantial measurable academic progress. While its work is
24 not done, the positive trend is undeniable.

25 Furthermore, the District has a plan to continue its improvement. That plan
26 includes school improvement plans, significant curriculum mapping and pacing

1 improvements, and upgraded professional development practices. It also includes an
2 IGA with ADE, set to begin July 1, 2008, that both parties agreed would help the four
3 failing schools get back to at least performing status. Despite entering into this
4 agreement, and before it has even had a chance to succeed or fail, ADE now wants to
5 simply bully its way to a take over of the Roosevelt School District. That should not be
6 allowed for a number of legal reasons explained herein and factual reasons that will, if
7 necessary, be presented at the hearing. But, at a minimum, ADE should honor its
8 agreement and this Board should insist that the agreement, which both parties agree is
9 likely to result in performing status at the four failing schools, should be given a chance
10 to work as that is the least intrusive and least disruptive approach to insure that
11 Roosevelt's academic growth continues.

12 A State Board forced change in superintendents and school control, is
13 unnecessary in light of the IGA and Roosevelt's recent progress and would disrupt the
14 continuity and momentum that has been built. It would wipe out the notion of local
15 control of schools – a bedrock principle in Arizona.

16 **II. CONSTITUTIONAL CONCERNS**

17 Arizona Revised Statutes § 15-107 violates state and federal constitutional
18 provisions both on its face and as applied in this instance.

19 **These proceedings, as they are being applied to Roosevelt, violate**
20 **constitutional guaranties of due process.**

21 Due process requires ADE to disclose the nature of the charges and the evidence
22 in support of those charges as well as giving a defendant a sufficient opportunity to
23 prepare its defense. Neither the United States' or Arizona's legal system obligates a
24 defendant to present what amounts to an extemporaneous defense. The proceedings
25 being utilized by the State Board of Education have deprived Roosevelt of a sufficient
26 opportunity to prepare its defense. The State did not disclose any exhibits, supporting

1 documentation or potential witnesses until six working days before this hearing. The
2 State has made supplemental disclosures as recently as yesterday. Roosevelt has had
3 virtually no time to digest the thousands of pages the State provided at the midnight
4 hour. This "dump and run" approach is unconstitutional because Roosevelt does not
5 have sufficient time to review the information, digest it, consult with staff (many of
6 whom are on summer break) or outside experts in light of the volume and nature of the
7 information. The unfairness of the proceedings is further illustrated by the fact that
8 Roosevelt was required to disclose all of its exhibits and potential witnesses before it
9 received any of the State's information. Requiring Roosevelt to defend itself against
10 over 100 allegations, purportedly supported by thousands of pages of documents which
11 will be testified to by a number of witnesses is unfair and has the effect, if not the intent,
12 of making this proceeding nothing more than a state sponsored sucker punch.

13 **A. Due Process – Federal Constitution 14th Amendment and AZ**
14 **Constitution Art. 2 § 4**

15 The proceedings and statute are also unconstitutional on their face. Both the
16 federal and state constitutions state that "No person shall be deprived of life, liberty, or
17 property without due process of law."

18 Due process requires that the state provide a written notice of the specific
19 grounds of the charges; disclosure of the evidence supporting the charges; the
20 opportunity to confront and cross-examine available adverse witnesses; the opportunity
21 to be heard in person and present evidence; the opportunity to be represented by
22 counsel; a fair-minded and impartial decision maker; and a written statement by fact-
23 finders as to the evidence relied upon and the reasons for the determination made.

24 *Arizona Dept. of Economic Sec. v. Redlon*, 215 Ariz. 13, 17, 156 P.3d 430, 434
25 (Ariz.App. Div. 2,2007).
26

1 Roosevelt's right to substantive due process is also violated because A.R.S. § 15-
2 107 violates "some *basic and fundamental principles*" created by the Constitution.
3 *Santiago de Castro v. Morales Medina*, 943 F.2d 129, 131 (1st Cir.1991).

4 **B. A.R.S. 15-107 improperly infringes on local control of schools in**
5 **violation of the Arizona Constitution.**

6 School districts are governed locally, and the importance of local control is
7 widely recognized. School districts are locally managed by an elected local governing
8 board and a superintendent. A.R.S. 15-107 destroys the local control of certain schools,
9 delegating that control instead to the state and to a state-delegated superintendent.
10 A.R.S. 15-107 therefore violates the Arizona Constitution by infringing on state's
11 interest in local control of schools.

12 **1. The law in Arizona, as in other states, mandates that local**
13 **school districts control the day-to-day management of schools, while the**
14 **State and Federal governments provide standards and rules generally**
applicable throughout the state.

15 Local school boards are directed by statute to manage their schools. Under
16 A.R.S. 15-341, the school district governing boards "*shall*" manage their schools in a
17 number of ways, including "[p]rescrib[ing] and enforc[ing] policies and procedures for
18 the governance of the schools" (15-341(A)(1)(emphasis added), among other things.
19 Importantly, the school boards are mandated through the use of the word "shall" to
20 perform these functions.

21 The Ninth Circuit recently analyzed the role of local control over schools in
22 *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036
23 (C.A.9 (Ariz.), 2003). The court found that an Arizona school district was not entitled
24 to sovereign immunity under the Eleventh Amendment, as it was not an agency of the
25 state. The court held that school districts were distinct political subdivisions with great
26 autonomy. In discussing local control, the court stated:

1 Arizona law, like the law of most states, grants local school districts
2 enormous autonomy in the management of public education. School
3 boards are required to (1) manage and control school property in the
4 district, *see* Ariz.Rev.Stat. § 15-341(A)(4); (2) set curricula; *see*
5 Ariz.Rev.Stat. § 15-341(A)(6); (3) establish criteria for high school
6 graduation; *see* Ariz.Rev.Stat. § 15-701.01(B)(2); (4) select either a year-
round or traditional school calendar; *see* Ariz.Rev.Stat. § 15-341(A)(2);
(5) construct school property, with voter approval; *see* Ariz.Rev.Stat. §
15-341(a)(8); and (6) furnish, repair and insure school property; *see*
Ariz.Rev.Stat. § 15-341(A)(7). School boards are also given wide
discretion in management of school districts. . . .

7 *Id.* at 1044-1045.

8 However, the state and federal government share responsibility in oversight of
9 schools. The state and federal governments exercise control over certain statewide
10 standards and requirements, rather than managing the day-to-day operations. In *Savage*,
11 the 9th Circuit also addressed this very issue:

12 However, . . . the State Board of Education sets statewide standards that
13 the local school boards must implement, arguing that this demonstrates
14 state governmental control. For example, the state board sets uniform
15 statewide courses of study and competency requirements for promotion
16 and graduation of students and controls certification of teachers,
17 Ariz.Rev.Stat. § 15-203; § 15-701; § 15-701.01, approves standardized
tests, § 15-741, and prescribes criteria for determining students' English
proficiency. Ariz.Rev.Stat. § 15-756. . . . Arizona defines on a state-wide
basis attendance requirements, circumstances when students may be
expelled, and procedures for student discipline.

18 *Savage*, 343 F.3d at 1044.

19 In determining that school districts are separate political entities from the state
20 despite the state's authority to prescribe minimum standards, the court reasoned as
21 follows:

22 However, if prescribing minimum standards were the measure of a
23 "central government function," then school districts would doubtless be
24 considered an arm of the federal government, as well, by virtue of such
25 statutes as the No Child Left Behind Act of 2001, Pub.L. 107-110, 115
26 Stat. 1425, 20 U.S.C.A. § 7231. [S]ubstantial discretion is given to the
school board in each of these areas. For example, while the state
mandates the contours of the school year, school month, and holidays, §
15-801, school districts retain discretion to decide whether to appoint an
attendance officer, § 15-804, (who would be paid out of school district

1 rather than state funds, § 15-805) and to adopt their own policies
2 regarding excuse of pupils from school attendance for religious purposes.
3 § 15-806. The provision for the expulsion of unruly students gives
4 substantial discretion to the School Districts concerning whether or not to
5 expel or readmit a student, whether to admit a student expelled by another
6 educational institution, or whether to reassign a student to an alternative
7 educational program. Ariz.Rev.Stat. § 15-841. The state only mandates
8 that students “shall” be expelled in a few exceptional cases, such as
9 bringing a firearm to school or when the student has been determined to
10 be a threat. *Id.* And the statute prescribing procedures for student
11 discipline provides that “[t]he governing board of any school district
12 shall, in consultation with the teachers and parents of the School District,
13 prescribe rules for the discipline, suspension and expulsion of students,”
14 provided those rules follow state procedural guidelines. Ariz.Rev.Stat. §
15 15-843.

16 Additionally, the state grants school districts power to “[p]rescribe and
17 enforce policies and procedures for the governance of the schools”
18 provided they are consistent with state law. Ariz.Rev.Stat. § 15-
19 341(A)(1). For example, local districts can manage and control school
20 property in the district, § 15-341(A)(4), acquire books, supplies and
21 furniture, § 15-341(A)(5), make conveyances of school property, § 15-
22 341(A)(9), prescribe curricula and criteria for promotion and graduation
23 provided it meets state guidelines § 15-341(A)(6), and select textbooks
24 and supplemental textbooks for common schools and high schools.
25 Ariz.Rev.Stat. §§ 15-721 & 15-722.

26 *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d
1036, 1044 -1045 (C.A.9 (Ariz.),2003).

17 **2. Local control of schools is a valuable and historic element of** 18 **Arizona culture.**

19 Local community control of schools is a firmly rooted tradition in Arizona, as in
20 many other states. The Ninth Circuit noted the value of local control as follows: “Most
21 communities value local control of their schools. Like most states, Arizona has chosen
22 to vest the control of school districts in local school boards.” *Savage v. Glendale Union*
23 *High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1051-1052 (C.A.9
24 (Ariz.), 2003).

25 In *Roosevelt Elementary School Dist. No. 66 v. Bishop*, 179 Ariz. 233, 244, 877
26 P.2d 806 (Ariz.,1994), the Arizona Supreme Court found that school financing laws

1 violated the Arizona Constitution by denying a “general and uniform” public school
2 system. Writing for the majority, Justice Martone stated “[l]ocal control in [education]
3 is an important part of our culture.” *Id.* at 242. Also in *Roosevelt*, Vice Chief Justice
4 Moeller, in his dissenting opinion, wrote separately in part to defend the importance of
5 local control:

6 Lastly, on the uniformity point, I fear that today's plurality opinion will
7 eviscerate effective local control of our public schools. I find it ironic,
8 therefore, that both the plurality opinion and the special concurrence pay
9 homage to the historical significance of local control. . . . I simply
10 disagree with the plurality and the special concurrence which urge that
11 centralized state financing may peacefully coexist with meaningful local
12 control. . . . The plurality properly concedes the importance of local
13 control in our schools and correctly acknowledges that the state system
14 will suffer if such control is lost. Yet, enforcement of the plurality opinion
15 will inevitably diminish local control. The framers of the Arizona
16 constitution never intended such an anomalous result.

17 *Roosevelt Elementary School Dist.*, 179 Ariz. at 253 (dissenting opinion).

18 In a line of cases following *Roosevelt*, the Arizona Supreme Court again
19 acknowledged the value of local control of schools. First, in *Hull v. Albrecht*, 190 Ariz.
20 520, 950 P.2d 1141 (Ariz.,1998) (or *Albrecht I*), the Arizona Supreme Court wrote that
21 “the ability to go above and beyond the state system is the key to local control.” *Id.* at
22 524. Then, in *Hull v. Albrecht*, 192 Ariz. 34, 37-38, 960 P.2d 634 (Ariz.,1998) (or
23 *Albrecht II*), the Court stated “[i]ndeed, we have noted that ‘local control’ is a
24 historically important value that may contribute to the overall effectiveness of the public
25 school system.” *Id.* at 637-638 (citing *Roosevelt*, 179 Ariz. at 242, 877 P.2d at 815. at
26 523, 950 P.2d at 1144.

27 **3. State is improperly usurping local control.**

28 **a. Local control generally**

29 School districts are given powers of local control through statutory authority.
30 Powers can be subject to local control, or solely to state control, or mixed between the
31 two. Importantly, the state government is prohibited from usurping powers intended

1 solely for local control. For example, municipalities have certain powers upon which
2 the state should not intrude. Example of this include the following:

3 Municipal affairs subject to local control, independent of any state
4 legislative interference, are those subjects of "solely local concern,"
5 rather than subjects of statewide or mixed statewide and local concern.
6 *City of Tucson v. Consumers for Retail Choice*, 197 Ariz. 600, ¶ 6, 5 P.3d
7 934, ¶ 6. In general, when a city acts "as an agent of the state," the subject
8 upon which it acts is not of solely local concern. *Luhrs v. City of Phoenix*,
9 52 Ariz. 438, 443, 83 P.2d 283, 285 (1938). "Some [municipal] activities
10 are so noticeably local or state-wide that they are easily assignable...." *Id.*
11 at 442, 83 P.2d at 285; *Tucson Sunshine Climate Club*, 64 Ariz. at 8, 164
12 P.2d at 602.

13 Our supreme court has held that "the sale or disposition of property by
14 charter cities" is a matter of solely local concern in which the state
15 legislature may not interfere. *City of Tucson v. Arizona Alpha of Sigma*
16 *Alpha Epsilon*, 67 Ariz. 330, 336, 195 P.2d 562, 566 (1948).

17 *McMann v. City of Tucson*, 202 Ariz. 468, 472, 47 P.3d 672, 676 (Ariz.App. Div.
18 2,2002). *See also*:

19 We believe in view of our constitution and the code sections involved that
20 the manner and method of disposal of real estate of a city is not a matter
21 of state-wide public concern. It is of no interest to the cities of Phoenix,
22 Yuma, or any other city or town in the State of Arizona, what the
23 provisions of the charter of the City of Tucson provide in this respect. The
24 people of Arizona, through their duly elected representatives, should not
25 be concerned with legislation looking to the intricacies of management of
26 a large city. Its problems are myriad and personal. It is for this reason that
the constitution authorized cities of a certain size to enact charters for
their self-government, within the limitations of the constitution. We
therefore hold that the sale or disposition of property by charter cities is
not a matter of general or public concern, and that the provisions of
section 16-801 relating to the sale of real estate, which is a limitation
upon the powers of cities and towns organized under article 2, chapter 16,
A. C. A. 1939, have no application to charter cities and constitute no
limitation upon them.

City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 336, 195 P.2d
562, 566 (Ariz.1948).

b. Local control of schools is a compelling state interest.

Similar to a city or a town, a school district is a political subdivision under
Arizona law. *Amphitheater Unified Sch. Dist. v. Harte*, 128 Ariz. 233, 235, 624 P.2d

1 1281, 1283 (1981). *See also Hernandez v. Frohmiller*, 204 P.2d 854, 859, 68 Ariz. 242,
2 (Ariz. 1949) (“Political subdivisions of the state include not only counties, cities, towns,
3 and school districts, but under section 7, article 13, Arizona Constitution, as amended,
4 include irrigation, power, electrical, agricultural improvement, drainage, and flood
5 control districts.”) As such, school districts have the rights and powers conferred to
6 them by the state. *Sanderson Lincoln Mercury, Inc. v. Ford Motor Co.*, 205 Ariz. 202,
7 206, 68 P.3d 428, 432 (Ariz.App. Div. 1,2003).

8 As discussed above, local control of schools is important. Whether local control
9 of schools is a compelling state interest has not been expressly decided in Arizona;
10 however, the Arizona Supreme Court indicated that strict scrutiny should apply as
11 education is a fundamental right. In *Roosevelt Elementary School Dist.*, *supra*, the
12 Arizona Supreme Court noted that education is a fundamental right in Arizona, but
13 expressly refused to consider whether the financing scheme violated the equal
14 protection clause (the privileges or immunities clause in the Arizona constitution) and
15 rather decided the case on the more narrow “general and uniform” constitutional
16 violation. Importantly, dicta throughout the case notes that because education is a
17 fundamental right, infringement on that right should be subject to strict scrutiny.
18 Specifically, the majority stated:

19 We do not understand how the rational basis test can be used when a
20 fundamental right [to education] has been implicated. They seem to be
21 mutually exclusive. If education is a fundamental right, the compelling
22 state interest (strict scrutiny) ought to apply. On the other hand, if the
23 rational basis test properly applies, education is not a fundamental right...
24 We need not, however, resolve this conundrum . . .

25 *Id.* at 238.

26 However, Chief Justice Feldman, in his concurring opinion in *Roosevelt*, noted
that while the majority “recognize[d] a valid state interest in local or school district
control of education,” he believed they should have also decided on the basis of an

1 equal protection violation. *Id.* at 245. Justice Feldman “would take the final step and
2 resolve this conundrum. The existing statutory scheme . . . violates the equal protection
3 clause of the Arizona Constitution.” *Id.* at 245. In so deciding, Justice Feldman quoted
4 a California case which stated that “local control of education through local school
5 districts *is* a compelling state interest . . .” *Id.* at 244 (emphasis in original).

6 **4. Usurping local control violates fundamental principles of the**
7 **Arizona Constitution.**

8 A.R.S. 15-107 is unconstitutional, as it violates the fundamental right to
9 education and the constitutional requirement of a “general and uniform” school system
10 by destroying local control.

11 **a. Fundamental right to education**

12 Under Art. XI of the Arizona Constitution, education is a fundamental right. *See*
13 *also Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973). Infringement upon this
14 fundamental right therefore must be narrowly tailored to achieve a compelling state
15 interest. Inherent in this right to education is local control through local school districts.
16 *See Roosevelt, Albrecht I and II, and Savage, supra.*

17 **b. General and uniform public school system**

18 The Arizona Constitution Art. 11 § 1.A. states that “[t]he legislature shall enact
19 such laws as shall provide for the establishment and maintenance of a general and
20 uniform public school system. . . .” As discussed in the above cases, the importance of
21 local control is fundamental to the general and uniform public school system. One
22 school district that is run by the state is not “general and uniform” within the public
23 school system, when all other school districts are run locally in adherence to the state’s
24 interest in local control.

1 **c. Equal Protection**

2 A.R.S. 15-107 denies children equal educational opportunities because of where
3 they live. Students living in certain areas will not receive the benefits of a locally
4 controlled school district that other students will receive. This is a violation of the
5 privileges or immunities clause of the Arizona Constitution, art. 2§ 13, which states
6 “[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other
7 than municipal, privileges or immunities which, upon the same terms, shall not equally
8 belong to all citizens or corporations.” As discussed, the state has a compelling interest
9 in local control over education.

10 **C. A.R.S. 15-107 violates the constitutional prohibition on ex post facto**
11 **laws and impairment of contract obligations.**

12 Article 2, section 25 of the Arizona Constitution states that “No . . . ex-post-facto
13 law, or law impairing the obligation of a contract, shall ever be enacted. As discussed

14 A.R.S. 15-107 constitutes unconstitutional retroactive legislation. Under A.R.S.
15 1-244, which states “[n]o statute is retroactive unless expressly declared therein,” a
16 statute intended to be retroactive must so state. A.R.S. 15-107 does not have a
17 retroactivity provision. The general rule prohibiting retroactive legislation is that
18 “legislation may not disturb vested substantive rights by retroactively changing the law
19 that applies to completed events.” *San Carlos Apache Tribe v. Superior Court*, 193
20 Ariz. 195, ¶ 15, 972 P.2d 179, 189 (1999).

21 In this case, A.R.S. 15-107 is relying on acts which occurred prior to the statute
22 (such as Roosevelt’s site visits and admissions to the ADE). As discussed, local control
23 is a compelling state interest, and A.R.S. 15-107 infringes on the right to an education
24 by a locally-controlled school district.

25 A.R.S. 15-107 also impermissibly impairs of contracts. Impairment of contract
26 occurs when new legislation changes the preexisting legal rights of parties established

1 by contract. “To prove the unconstitutional impairment of a contract, a party must
2 prove: (1) the existence of a contract, and (2) an unconstitutional impairment of that
3 contract.” *Baker v. Arizona Dept. of Revenue*, 209 Ariz. 561, 105 P.3d 1180 (App. Div.1
4 2005), reconsideration denied, review denied. “The contractual ‘obligation’ that is the
5 subject of constitutional protection against impairment of contracts consists of the law
6 or duty binding the parties to perform their agreement, and such an obligation is
7 impaired when the legislative enactment changes the obligation in favor of one party
8 against another, either by enlarging or reducing the obligation.” *Phelps Dodge Corp. v.*
9 *Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 83 P.3d 573 (App. Div.1 2004)
10 amended on denial of reconsideration, review denied.

11 Roosevelt entered into certain contracts with the state, including
12 intergovernmental agreements, and employment contracts with its own superintendent
13 and staff, which would be impaired by A.R.S. 15-107.

14 ***The Statute is Illegal Retroactive Legislation***

15 Our system holds paramount the concept that “legislation may not disturb vested
16 substantive rights by retroactively changing the law that applies to completed events.”
17 *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, ¶ 15, 972 P.2d 179, 189
18 (1999). In *San Carlos*, the court found “implementation of . . . retroactive intent to
19 affect vested substantive rights to water would violate the due process guarantee of
20 article II, section 4 of the Arizona Constitution.” *Id.* at 205. Here, the parties have
21 agreed to an IGA. Roosevelt's rights under the IGA and elsewhere cannot be undone by
22 this new statute.

23 ***The New Law is an Unlawful Impairment of Contracts***

24 The constitutional clause restricting impairment of contracts refers to new
25 legislation that changes the preexisting legal rights of parties established by contract.
26 “To prove the unconstitutional impairment of a contract, a party must prove: (1) the

1 existence of a contract, and (2) an unconstitutional impairment of that contract.” *Baker*
2 *v. Arizona Dept. of Revenue*, 209 Ariz. 561, 105 P.3d 1180 (App. Div.1 2005),
3 reconsideration denied, review denied. “The contractual ‘obligation’ that is the subject
4 of constitutional protection against impairment of contracts consists of the law or duty
5 binding the parties to perform their agreement, and such an obligation is impaired when
6 the legislative enactment changes the obligation in favor of one party against another,
7 either by enlarging or reducing the obligation.” *Phelps Dodge Corp. v. Arizona Elec.*
8 *Power Co-op., Inc.*, 207 Ariz. 95, 83 P.3d 573 (App. Div.1 2004) amended on denial of
9 reconsideration, review denied. The new statute, if applied retroactively, would be
10 unconstitutional in light of the IGA and Roosevelt's other vested contractual rights.

11 **D. A.R.S. 15-107 violates the separation of powers doctrine.**

12 Article 3 of the Arizona Constitution: “The powers of the government of the
13 State of Arizona shall be divided into three separate departments, the Legislative, the
14 Executive, and the Judicial; and, except as provided in this Constitution, such
15 departments shall be separate and distinct, and no one of such departments shall
16 exercise the powers properly belonging to either of the others.”

17 A.R.S. 15-107 violates the separation of powers doctrine by improperly taking
18 the powers of the elected school board officials to govern the local school district and of
19 the legislature to provide for the public school system and delegating such powers to the
20 State Board of Education, an executive branch. Similarly, in *Hernandez v. Frohmiller*
21 68 Ariz. 242, 204 P.2d 854, 862 (Ariz.1949), the Arizona Supreme Court found a
22 violation of separation of powers when authority was taken from an education board
23 and given to an administrative board:

24 We are urged to say that the act delegates to the civil service board
25 legislative powers. It is axiomatic that neither the legislature nor the
26 people can delegate to an administrative board the power to legislate.
Only the people and the legislature may perform this function.

1 *Id.* at 254. In that case, the initiative “invade[d] the constitutional powers of the board
2 of regents by granting partial supervision of state educational institutions to the civil
3 service board.” *Hernandez v. Frohmiller* 68 Ariz. 242, 259, 204 P.2d 854,
4 862 (Ariz.1949).

5 **E. A.R.S. 15-107 improperly expands the powers of the State Board of**
6 **Education beyond their constitutional powers while improperly usurping the**
7 **powers of the local governing board.**

8 A.R.S. 15-107 exceeds the authority granted to the SBE by law. In Art. 11 § 3 of
9 the Arizona Constitution, the SBE is limited to “[t]he powers, duties, compensation and
10 expenses, and the terms of office, of the board . . . as may be prescribed by law.”

11 A.R.S. 15-203 lists the specific powers given to the SBE, and these include powers
12 pertaining to SBE’s internal governance as well as to setting statewide standards and
13 guidelines for school districts. .

14 Under A.R.S. 15-107, the SBE’s powers include making a determination of
15 systemic educational mismanagement, appointing a new superintendent, and monitoring
16 the district. The SBE does not have this power under A.R.S. 15-203.

17 Importantly, as discussed above, the local school district does have these powers.
18 A.R.S. 15-341 mandates that school district governing boards manage the schools. As
19 noted above, A.R.S. 15-107, therefore, is usurping the powers of the school district as
20 mandated by law, and giving them to the SBE, which does not have those powers by
21 law.

22 **F. Constitutional provision: AZ Constitution Art. 9 § 1, TAXATION**

23 “The power of taxation shall never be surrendered, suspended or contracted
24 away. Except as provided by § 18 of this article, all taxes shall be uniform upon the
25 same class of property within the territorial limits of the authority levying the tax, and
26 shall be levied and collected for public purposes only.” Basically, the power of taxation

1 “shall never be surrendered, including’ not only the power to levy and assess taxes but
2 also the power to collect them.” *Shumway v. State* 63 Ariz. 400, 163 P.2d 274 (1945).
3 Roosevelt school board's power to tax cannot be usurped by a state board appointed
4 superintendent who purportedly could override or undo legal decisions of a lawfully
5 elected governing board.

6 **G. Constitutional provision: AZ Constitution Art. 9 § 7, GIFT OF**
7 **PUBLIC FUNDS**

8 “Neither the state, nor any county, city, town, municipality, or other subdivision
9 of the state shall ever give or loan its credit in the aid of, or make any donation or grant,
10 by subsidy or otherwise, to any individual, association, or corporation, or become a
11 subscriber to, or a shareholder in, any company or corporation, or become a joint owner
12 with any person, company, or corporation, except as to such ownerships as may accrue
13 to the state by operation or provision of law or as authorized by law solely for
14 investment of the monies in the various funds of the state.”

15 The Gift Clause in Article 9, Section 7 of the Arizona Constitution prohibits gifts
16 of public funds by any public entity. “This section, limiting the power of municipalities
17 to expend public money, is generally construed as directed against benefits at public
18 expense attempted in behalf of individuals, corporations, or associations acting
19 independently and conducting some enterprise of their own such as are usually
20 conducted for profit and are commercial in nature.” *City of Phoenix v. Michael* (1944)
21 61 Ariz. 238, 148 P.2d 353.

22 Under HB2711, Roosevelt would purportedly be forced to use its funds to pay
23 the salaries of ADE employees. Doing so is an impermissible gift.

24 **III. STATUTORY CONCERNS**

25 House Bill 2711, enacted at A.R.S. § 15-107, violates retroactivity principals.
26

1 House Bill 2711 violates retroactivity principles. Statutes can be based on past
2 events, or “antecedent facts,” only if they do not retroactively affect individual’s vested
3 substantive rights.

4 ***Retroactive Legislation:***

5 Generally, legislation cannot be applied retroactively with the following
6 exceptions. The legislature can specifically designate statutes as retroactive, but must
7 expressly state so in the legislation. A.R.S. 1-244 reads “No statute is retroactive unless
8 expressly declared therein.” The statute at issue, A.R.S. 15-107, does not include a
9 retroactivity provision.

10 ***Antecedent Facts:***

11 Here, ADE wants to implement A.R.S. § 15-107 based on allegations that
12 predate the passage of the statute. It cannot do so.

13 The following two comparable cases are examples of legislation allegedly based
14 on antecedent facts that violated the retroactivity principle. In *Earthworks Contracting,*
15 *Ltd. v. Mendel-Allison Const. of California, Inc.* 167 Ariz. 102, 804 P.2d 831 (Ariz.
16 App., 1990), a new statute required contractors be licensed. This statute restricted
17 unlicensed contractors’ abilities to collect for work completed prior to the passage of the
18 new statute. The court found “the licensing requirements cannot constitutionally be
19 applied to Earthworks’ contractual claims, which are based on obligations contractually
20 incurred before the effective date of the licensing requirement.” *Id.* at 108-109.

21 In *Aranda v. Industrial Com’n of Arizona*, 198 Ariz. 467, 11 P.3d 1006 (Ariz.,
22 2000), the Supreme Court found that a statute changing workers’ compensation benefits
23 could not be applied retroactively in this case. The claimants had a “vested property
24 right” in receiving predetermined workers’ compensation benefits. The Court
25 distinguished *Tower* in part because “a claimant’s injury and workers’ compensation
26

1 award are not mere antecedent facts to which the statute 'relates' but are the operative
2 events which result in vesting the award." *Id.* at 472.

3 Whether the statute is applied retroactively or is based on "antecedent facts," the
4 same rules governing retroactivity apply. "[L]egislation may not disturb vested
5 substantive rights by retroactively changing the law that applies to completed events."
6 *City of Tucson v. Clear Channel Outdoor, Inc.*, 181 P.3d 219, 227 -228 (Ariz. App.
7 Div. 2, 2008) (Citations omitted).

8 ***Substantive Vested Rights:***

9 The courts have construed the prohibition on retroactive statutes as applying only
10 to substantive rights, rather than procedural. A right is vested "when the right to
11 enjoyment, present or prospective, has become the property of some particular person or
12 persons as a present interest." *In re Commitment of Frankovitch*, 211 Ariz. 370, 373,
13 121 P.3d 1240, 1243 (Ariz. App. Div. 2, 2005)(citations omitted). "A property right
14 'vests' *when every event has occurred* which needs to occur to make the implementation
15 of the right a certainty." *Naslund v. Industrial Com'n of Ariz.*, 210 Ariz. 262, 265, 110
16 P.3d 363, 366 (Ariz.App. Div. 1,2005)(emphasis in original)(citing *Aranda, supra*, 198
17 Ariz. at 471).

18 **IV. VOTING RIGHTS ACT**

19 The State Board cannot exercise any of its rights under House Bill 2711 unless or
20 until it complies with the Voting Rights Act, which it has not done. House Bill 2711 is
21 subject to the requirements of the Voting Rights Act of 1965 § 5 because any
22 superintendent that would be appointed by the Arizona State Board of Education would
23 supplant the authority of the duly elected school district governing board. *Presley v.*
24 *Etowah County Com'n*, 502 U.S. 491, 502, 112 S.Ct. 820, 828 (1992). (There are four
25 categories in which the Voting Rights Act of 1965 applies: changes involving the
26 manner of voting; changes involving the candidacy requirements and qualifications;

1 changes in the composition of the electorate that may vote for candidates for a given
2 office; and changes affecting the creation or abolition of an elective office. House Bill
3 2711 falls within the fourth category.); Laws 2008, Chapter 139; see *Allen v. State Bd.*
4 *of Elections*, 393 U.S. 544, 550-51, 89 S.Ct. 817, 823-24 (1969). House Bill 2711
5 eliminates, at least in part, the authority of the duly elected district school board for a
6 term of three years coterminous with that of the appointed superintendent. *Presley*, 502
7 U.S. at 502, 506, 112 S.Ct. at 828, 830. The appointed superintendent purportedly has
8 veto powers over the elected board and power to initiate binding action without the
9 existing duly elected board's consent. Laws 2008, Chapter 139. Furthermore, the
10 United States Supreme Court has acknowledged circumstances that “rise to the level of
11 a *de facto* replacement of an elective office with an appointive one” also violate the Act.
12 *Presley*, 502 U.S. at 508, 112 S.Ct. at 831. At a minimum, this is one of those cases.

13 A State or political subdivision subject to the Voting Rights Act of 1965 is
14 required to obtain judicial or administrative preclearance before enforcing any new
15 “qualification or prerequisite to voting, or standard, practice or procedure with respect
16 to voting.” *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803 (1966)(The case
17 upheld the Voting Right Acts against a constitutional challenge.); *Allen*, 393 U.S. 544,
18 550-51, 89 S.Ct. 817, 823-24 (1969); *Presley*, 502 U.S. at 494, 112 S.Ct. at 824; Voting
19 Rights Act of 1965, as amended, 42 U.S.C. § 1973c. The State or political subdivision
20 subject to the Voting Rights Act of 1965 must either receive a declaratory judgment
21 from the U.S. District Court for the District of Columbia that the prerequisite, standard,
22 practice or procedure does not or will not have the effect of denying or abridging the
23 right to vote on account of race, color or membership in a language minority group or it
24 has been submitted to the Attorney General and the Attorney General has made no
25 objection within a 60-day period following submission. 28 C.F.R. Part 51. As of
26 November 1, 1964, Arizona is required to submit all such changes for preclearance

1 before the changes are valid. Voting Rights Act of 1965, as amended, 42 U.S.C. §
2 1973c; 40 Fed. Reg. 43746 (Sept. 1975); 28 C.F.R. Part 51 (2008). There is no
3 indication that House Bill 2711 has been submitted for preclearance. Accordingly, this
4 proceeding violates well established federal law because House Bill 2711 is being
5 implemented even though preclearance has not been sought or obtained. All
6 proceedings under House Bill 2711 should be stopped unless or until preclearance has
7 been granted. Any actions to the contrary violate clearly established legal rights.

8 The duly elected members of Roosevelt's school board are all "protected
9 minorities" under the Voting Rights Act of 1965, Section 2, as amended, 42 U.S.C.
10 1973. In *Bunton v. Patterson*, the Mississippi legislature amended its Code to eliminate
11 the county's option to elect the county superintendent of education. *Bunton v.*
12 *Patterson*, 281 F. Supp. 918 (S.D. Miss. 1967); *Allen v. State Bd. of Education*, 393
13 U.S. 544, 550-51, 89 S.Ct. 817, 824 (1969). Prior to the amendment, the counties had
14 the option of either electing or appointing the county superintendent. *Id.* The Supreme
15 Court held that before the amendment could be enforceable, it must meet the approval
16 requirements of the Voting Rights Act of 1965, Section 5. *Allen v. State Bd. of*
17 *Education*, 393 U.S. at 570, 89 S.Ct. at 834. Voting included "all action necessary to
18 make a vote effective" including eliminating the county's option to have the county
19 superintendent's position be "subject to the approval of the voters." *Id.* The Supreme
20 Court stated that any state law that altered the election law of a covered State "even in a
21 minor way" would be subject to the provisions of the Voting Rights Act of 1965,
22 Section 5. *Id.* at 566, 89 S.Ct. at 832. Whether the change was made with a
23 discriminatory purpose or not was not determinative because the purpose of the Act was
24 to require pre-approval of any change that affected a person's voting rights. *Id.*

1 **V. SYSTEMIC EDUCATIONAL MISMANAGEMENT**

2 If the State Board proceeds, despite all of these reasons to delay these
3 proceedings, it should not exercise any of the authority purportedly vested in it by the
4 statute. The evidence will show that Roosevelt Elementary School District's academic
5 achievement has taken significant steps forward under the current leadership. That
6 progress is consistent across grades and across disciplines and reaches virtually every
7 school in the school district. Moreover, with the AIMS test that was recently
8 administered, but has not yet been fully scored on the Arizona Learns scales, it is quite
9 possible and even likely that the statute will not apply. If there is net gain of one school
10 in the performing or above categories, among Roosevelt's 21 schools, the terms of
11 House Bill 2711 would no longer apply to Roosevelt.

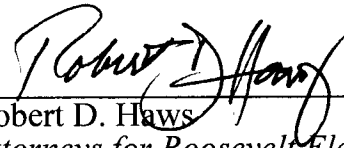
12 **VI. CONCLUSION**

13 For all the foregoing reasons, this matter should be dismissed. Alternatively, no
14 action should be taken at this time.

15 DATED this 18th day of June, 2008.

16 **GUST ROSENFELD P.L.C.**

17 By

18 
Robert D. Haws
19 Attorneys for Roosevelt Elementary School
District

20
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